certiorari, we decline to address these arguments.

The Michigan Supreme Court has held that exclusion is inappropriate in this circumstance,[4] a position also taken by the United States Court of Appeals for the Seventh Circuit.[5] In asking this Court to reach a contrary conclusion, petitioner in effect requests this Court to cut the application of the exclusionary rule loose from its doctrinal moorings,[6] and creates a straw-man "inevitable discovery" opponent which he then attacks. But the issue here is causation not inevitable discovery; this Court has never found application of the Fourth Amendment exclusionary rule appropriate where there is no but-for causal relationship between the police error involved and the seizure of evidence. It should not do so here. This Court should reject petitioner's invitation to apply the exclusionary rule as an indiscriminate blunderbuss rather than a carefully controlled scalpel. That it should do so is counseled by the Court's own precedents concerning the nature and purpose of the rule, as well as concerning its application, and also the lack of exclusion in analogous situations.

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[4] *People v. Stevens*, 460 Mich. 626, 631, *cert. den.*, 528 U.S. 1164 (2000).

[5] See *United States v. Espinoza*, 256 F.3d 718, 726 (CA 7, 2001); *United States v. Langford*, 314 F.3d 892, 894 (CA 7, 2002); *United States v. Jones*, 149 F.3d 715, 716-17 (CA 7, 1998).

[6] As several courts have done, see, e.g., *State v. Lee*, 374 Md. 275, 821 A.2d 922 (Md., 2003); *United States v. Dice*, 200 F.3d 978 (CA 6, 2000).

B. The Exclusionary Rule: Its Origins, Purpose, and Limits

(1) Origins and Purpose

It cannot be gainsaid that *the* purpose of the exclusionary rule is to deter improper police conduct by denying the Government of the fruit of that conduct; thus, Respondent will not labor long to illustrate that point. While the Fourth Amendment itself has roots in such cases as *Wilkes v. Wood*,[7] *Entick v. Carrington*,[8] and *Semayne's Case*,[9] none of these cases resulted in the exclusion of evidence from a criminal proceeding, being rather, for the most part, civil cases to recover damages. Not until almost 100 years after the adoption of the Fourth Amendment did the notion of exclusion of evidence for its violation appear in our jurisprudence, in the case of *Boyd v. United States*.[10] Indeed, the contrary of the proposition that evidence should be excluded from trial based on the manner of its acquisition was well-established by the time of the *Boyd* decision. Professor Greenleaf listed among those doctrines of evidence which were "common to all the United States" that:

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[7] *Wilkes v. Wood*, 19 Howell's State Trials 1153 (1763).

[8] *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765) (upholding a verdict for trespass against the officers executing a general warrant).

[9] *Semayne's Case*, 77 Eng. Rep. 194, 195 (1603) (specifically concerning forcible entries into dwellings, and stating that "in all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors. . . .").

[10] *Boyd v. United States*, 116 U.S. 616 (1886).

> . . . though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine the question.[11]

And in *United States v. La Jeune*[12] Justice Story, sitting as circuit justice, rejected an argument that evidence should not be admitted because unlawfully seized, remarking that " . . . the law deliberates not on the mode, by which [evidence] has come to the possession of the party, but on its value in establishing itself as satisfactory proof." This opinion, along with that of Justice Wilde of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Dana*[13] that

> [i]f the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers as evidence, if they were pertinent to the issue. . . . [T]he court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question,

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[11] 1 Greenleaf, *A Treatise on the Law of Evidence* (14th ed., 1884), § 254a, p.325-326.

[12] *United States v. La Jeune*, 26 F. Case 832, 842 (CCD Mass., 1822) (No 15,551).

[13] *Commonwealth v. Dana*, 43 Mass. 329, 337 (1841).

were "invoked as authority for like decisions in other state courts" and "relied on by federal courts to justify the admission of books and papers into evidence, regardless of the legality of their seizure."[14] Case reports from almost the first 100 years of the existence of the Fourth Amendment reveal a number of actions alleging a wrongful search or seizure, with "traditional common-law forms of action associated with trespass . . . without exception, the modes of redress invoked."[15] The Fourth Amendment was not ignored; rather, "the requirements of due process and of nonarbitrary searches and seizures lived in harmony in the thought of the Founders. In that same jurisprudence, however, the exclusionary rule has no life at all."[16] And then came *Boyd*, for the first time excluding evidence obtained as the result of the manner of its acquisition.[17]

Boyd's Fifth Amendment/Fourth Amendment amalgam rationale for exclusion of evidence no longer obtains. Indeed, 18 years later this Court in *Adams v. New York*[18] rejected a challenge to evidence seized under a search warrant by simply declaring that courts will not inquire into the means by which evidence otherwise admissible was acquired, distinguishing *Boyd* on its Fifth Amendment rationale by limiting it to situations where a "positive act"

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[14] Bradford P. Wilson, "The Fourth Amendment as More Than a Form of Words: The View from the Founding," in Hickok, editor, *The Bill of Rights* (University Press of Virginia, 1991), p. 151, 169.

[15] Wilson, at 165.

[16] Wilson, at 169.

[17] As Dean Wigmore said, the doctrine that evidence could not be excluded because of the manner of its acquisition "was never doubted until the appearance of the ill-starred majority opinion of *Boyd v. United States*. . . ." 4 Wigmore, *Evidence* (2d Ed. 1923) § 2184, p. 632.

[18] *Adams v. New York*, 192 U.S. 585 (1904).

of production on the part of the defendant was required.[19] But in *Weeks v. United States*[20] this Court first held that evidence may be excluded on the ground of the method of its seizure, established not in the context of a motion to suppress in the criminal case, but a motion for return of property before trial on the ground that the government had no right to possess it, with the same result – the loss of the government's ability to offer the items as evidence at the criminal trial. Here the rationale for exclusion had no Fifth Amendment basis; rather, said this Court, "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgment of the courts. . . . To sanction [an unlawful invasion of the dwelling] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution. . . . " In short, the evidence was excluded to prevent the Government from obtaining an *advantage* through a violation of the Constitution by excluding evidence obtained as a *result* of – by a causal connection to – that violation.

Extension of this exclusionary rule to the states was found inappropriate in *Wolf v. Colorado*, in an opinion written by Justice Frankfurter.[21] But *Wolf* did not long survive, as in *Mapp v. Ohio*[22] the rule of *Weeks* was applied

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[19] Today, this situation is treated in some circumstances by a Fifth Amendment right to avoid having mention that the defendant was the one who produced the items, rather than a Fourth Amendment right to avoid producing them. See *United States v. Doe*, 465 U.S. 605 (1984); *Couch v. United States*, 409 U.S. 322, 327 (1973).

[20] *Weeks v. United States*, 232 U.S. 383 (1914).

[21] *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

[22] *Mapp v. Ohio*, 367 U.S. 643 (1961).

to the States as a "deterrent safeguard . . . ", the Court also quoting approvingly from *Elkins v. United States*[23] that "[t]he rule is calculated to prevent not to repair. Its purpose is to deter . . . by removing the incentive to disregard it."[24] From the beginning, then, the emphasis has been on deterrence by depriving the government of the "fruits" gained from the improper police conduct. It is now beyond dispute that the exclusionary rule is *not* "part and parcel" with the Fourth Amendment, but rather is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[25] Most recently this Court in *Pennsylvania Board of Parole v. Scott*[26] held that the exclusionary rule does not apply at parole violation hearings, the Court observing that the admission of illegally seized evidence does not violate the Constitution; rather, the Fourth Amendment is violated when the illegal search occurs. The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures, which has societal costs and is therefore not to be applied unthinkingly. Indeed, Chief Justice Warren remarked in *Terry v. Ohio*[27] that:

> The exclusionary rule has its limitations as a tool of judicial control. . . . [In] some contexts the rule is ineffective as a deterrent. . . . Proper adjudication

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[23] *Elkins v. United States*, 364 U.S. 206 (1960).

[24] *Mapp*, at 657.

[25] *United States v. Calandra*, 414 U.S. 338 (1974). See also *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Leon*, 468 U.S. 897 (1984).

[26] *Pennsylvania Board of Parole v. Scott*, 524 U.S. 357 (1998).

[27] *Terry v. Ohio*, 392 U.S. 1, 3-15 (1968).

> of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. . . . [A] rigid and unthinking application of the . . . rule . . . may exact a high toll in human injury and frustration of efforts to prevent crime.

The purpose of the rule, then, is not to repair, but to deter, and it does so by depriving the government of that which was gained as a result of the improper conduct of the police – that which flows from it as an effect from a cause (though not inevitably, causation being necessary but not always sufficient). Application of the rule carries with it a high societal cost in damaging the trial as a search for truth by excluding reliable and probative evidence, and it is thus not to be applied reflexively.[28] As one commentator has well put it, "[g]ranted that so many criminals must go free to deter the constable from blundering, pursuance of this police of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest."[29] What is a "thinking" application of the rule which at least attempts in some measure to avoid the infliction of gratuitous harm on the public? What are its current limits?

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[28] After all, any rule opposed – either entirely, or as to its extension to the states – by such giants as Justices Frankfurter, Harlan, and Cardozo – deserves careful scrutiny in its application (Justice Cardozo opposed the rule when sitting as a state judge in New York, where he made his famous statement "[T]he criminal is to go free because the constable has blundered." *People v. Defore*, 150 N.E. 585, 587 (N.Y., 1926)).

[29] Amsterdam, "Search and Seizure and Section 2255: A Comment," 420 Pa. L. Rev. 378, 388-389 (1964).

(2) Limitations on the Exclusionary Rule: The Requirement of Causation

> . . . [defendant] contends that . . . we must rely on a "perverted variation" of the "inevitable discovery" exception. . . . If this case involved any "exception" to the exclusionary rule at all, it would be the "independent source" exception. . . . We do not, however, have to apply either "exception" in this case because *the indispensable causal connection between his detention and discovery of the gun has not been met.*[30]

That "but-for" causation is a necessary but not always sufficient element of a claim that evidence should be excluded because of a constitutional violation by the police is readily apparent from exclusionary rule jurisprudence. As Professor LaFave has said, "in the simplest of Fourth Amendment exclusionary rule cases, the challenged evidence is quite clearly 'direct' or 'primary' in its relationship to the prior arrest or search, so that if it is determined that a Fourth Amendment violation has occurred it is apparent that the consequence must be suppression of that evidence in the trial of a defendant who has standing to object to the violation."[31] But the exclusionary rule is not applicable in *all* cases where the evidence at issue would not have been discovered "but for" the improper conduct of the police, despite its deterrent effect in these situations. In some situations, the rule is not applied *despite* "but-for" causation because its cost is too high when weighed against its benefits.

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[30] *United States v. Pulliam*, 405 F.3d 782, 790-791 (CA 9, 2005) (emphasis supplied).

[31] 5 LaFave, *Search and Seizure* (3rd Ed.), § 11.4, p. 231-232.

- ***Personal Expectation of Privacy***: The Fourth Amendment protection is personal, and though excluding evidence where the Fourth Amendment rights of the individual against whom the evidence is offered were not offended might nonetheless carry with it some deterrent effect, it has long been recognized that the "need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."[32] The accused simply will not be heard to complain unless it is his or her Fourth Amendment rights that were compromised by the police.

- ***Fruit of the Poisonous Tree and Purged Taint***: Though *Nardone v. United States*[33] is the first case to make the point that a causal connection between improper governmental conduct and the discovery of evidence does not necessarily result in suppression, that principle came to full flower in *Wong Sun v. United States*.[34] This Court stated that the test for exclusion is *not* simply whether but for the illegal conduct of the police the evidence sought to be excluded would not have come to light, but whether, "granting establishment of the primary illegality, the evidence to which instant objection is made has

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[32] See *United States v. Calandra*, 414 U.S. 338, 348 (1974); *Rakas v. Illinois*, 439 U.S. 128 (1978).

[33] *Nardone v. United States*, 308 U.S. 338 (1939).

[34] *Wong Sun v. United States*, 371 U.S. 471 (1963).

been come at by exploitation of that illegality. . . ."[35] Even where there is a causal connection between the police illegality and the discovery of evidence, where the connection between the two has "become so attenuated as to dissipate the taint" the evidence is admissible nonetheless.[36]

- ***Inevitable Discovery***: In *Nix v. Williams*[37] this Court established the "inevitable discovery" doctrine. While, the Court said, the police may not place themselves in a *better* position through impermissible conduct than they otherwise would have been, there is no reason to put the police and public in a *worse* position than they would have been had the constitutional violation never occurred. Where the evidence would inevitably have been discovered it is simply not considered the fruit of the illegality – there is no exploitation of the illegality – and thus the illegality cannot cause its exclusion. This is a hypothetical doctrine; the evidence was discovered as a result of the illegal police conduct (there is a cause and effect relationship), but the prosecution can avoid exclusion by showing, hypothetically, and by a preponderance of the evidence, that the evidence would have been discovered if the illegality had not occurred.

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[35] *Wong Sun*, at 455.

[36] See similarly *Johnson v. Louisiana*, 406 U.S. 356 (1972); *United States v. Ceccolini*, 435 U.S. 268 (1978)

[37] *Nix v. Williams*, 467 U.S. 431 (1984).

- ***Independent Source***: Closely related to the fruit of the poisonous tree doctrine is the independent source doctrine – where there is improper police conduct resulting in the discovery of evidence in a "but for" sense, but the same evidence is come at by an independent lawful method, there is no reason to exclude it. This is distinguishable from inevitable discovery in that inevitable discovery does not posit an actual independent recovery of the evidence, but a hypothetical one, which the prosecution must demonstrate would have occurred without the illegality. With the independent source doctrine the evidence is actually obtained by a method independent of the improper one.[38]

- ***Noncriminal Proceedings***: Certain proceedings which are not criminal are not subject to the exclusionary rule. As already mentioned, this Court has recently held that the exclusionary rule does not apply to parole revocation proceedings. The exclusionary rule is a judicially created means of deterring illegal searches and seizures which exacts a high cost upon truth-seeking and law enforcement objectives. Particularly because parole is a variation of imprisonment, in itself a restraint on liberty, the State has an overwhelming interest in compliance with terms of parole which is hampered by application of the exclusionary rule. Moreover, parole proceedings are administrative and informal, a process which

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[38] See, e.g., *Murray v. United States*, 487 U.S. 533 (1988); *Segura v. United States*, 468 U.S. 796 (1984).

would be altered by application of the exclusionary rule, requiring in some cases extensive litigation on a collateral matter. The deterrence benefits of the rule, said the Court, simply do not outweigh its costs in this context. Thus, though the evidence may be a "but-for" result of improper police conduct, it will not be excluded in such a proceeding.[39]

- ***The Good-Faith Exception***: The good-faith exception was embraced by this Court in the companion decisions of *United States v. Leon*[40] and *Massachusetts v. Sheppard*.[41] *Leon* involved a search commanded by warrant, where a reviewing judge found the affidavit insufficient to show probable cause. *Sheppard* also involved a search commanded by warrant; the difficulty was that the lead detective employed a form for controlled substances search warrants though the warrant was not for controlled substances, and it was insufficiently modified and as a result still authorized a search for controlled substances. Evidence was found, then, that was not described in the warrant application, though described in the affidavit. This Court found exclusion inappropriate in both circumstances, observing that whether to employ the exclusionary sanction is an issue separate from the question of whether the Fourth Amendment rights of the person

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[39] See also *United States v. Janis*, 428 U.S. 433 (1978) with regard to civil actions.

[40] *United States v. Leon*, 468 U.S. 897 (1984).

[41] *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

> seeking to invoke the rule were violated by police conduct; that indiscriminate application of the exclusionary rule may well generate disrespect for the law and the administration of justice, and so its application should be restricted to those circumstances where its deterrent purpose is most efficaciously served; and that the deterrent function of the rule is not served when the evidence or contraband discovered is found as a result of police conduct that is objectively reasonable and in good faith.[42]

(3) Conclusion

The purpose of the exclusionary rule is to deter unlawful police conduct by preventing the Government from obtaining any advantage from that conduct. This end is accomplished by depriving the Government of the fruits of improper conduct. Where evidence is discovered which is a "direct" or "primary" result from improper police conduct – a direct effect from a cause – then the evidence will be excluded. But this rule of exclusion is not absolute, for even where the evidence sought to be admitted is the result of the improper conduct in that but for that conduct it would not have been discovered, the evidence will nonetheless be admissible if 1) the defendant is without standing to complain because it was not his or her right which was violated by the improper police conduct; 2) if the causal connection between the improper conduct and the discovery of the evidence is so attenuated that it can be said that the "taint" of the improper conduct is dissipated, or,

[42] *Leon*, at 906-922.

put another way, it can be said that the evidence was not obtained by police "exploitation" of the "primary illegality"; 3) the Government can demonstrate by a preponderance of the evidence that had the improper conduct which uncovered the evidence not occurred that evidence would have been discovered by lawful means; 4) the same evidence which was uncovered by the improper conduct is also obtained through a proper independent source; 5) the proceeding is not one to which the exclusionary rule is to be applied; or 6) the good-faith exception to exclusion is applicable under the circumstances.

In fine, "but-for" causation is a necessary – an indispensable – but not sufficient element of a claim that evidence should be excluded as a result of a constitutional violation by the Government; the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred.

C. Announcement and Exclusion of Evidence

(1) The Law Before *Wilson v. Arkansas*

The exclusion of evidence as a sanction for violation of principles of announcement where the search has otherwise been proper in all respects – the warrant demonstrates probable cause, and the search is one of proper scope and intensity – has slipped into the law almost by stealth. Its origins show no principled analysis of its application to a situation where causality is entirely absent; that is, where that which has been seized and is to be offered into evidence cannot be said in any principled

sense to be the "fruit" of the improper governmental conduct, particularly where in no other circumstance is the drastic sanction of exclusion ordered without a demonstration that *at least* there is a "but-for" causal relationship between the improper conduct and the discovery of the evidence. Petitioner relies heavily on *Miller v. United States*,[43] and it is thus with *Miller* that analysis should begin.

Clifford Reed was arrested on a Washington, D.C. street pursuant to an arrest warrant and told a federal narcotics agent that he had purchased heroin from Miller through an intermediary named Shepherd. Reed was to make another purchase from Shepherd that morning. An undercover officer accompanied Reed, and Shepherd agreed to obtain heroin and deliver it to the agent. Authorities followed Shepherd as he went by cab to Miller's apartment. Ultimately the agents went to Miller's apartment and knocked on the door. When Miller asked who was there they responded it was the police. Miller opened the door only partially, with an attached door chain barring the door, and the police forced their way inside when he began to close the door, ripping the chain off. Their purpose was to arrest Miller, but they had no warrant to arrest, and had not expressly demanded admission or stated the reason for their presence. Marked money that had been given to Reed to purchase the heroin was found in a search of the apartment; none of it was found on Miller's person. The principal claim before this Court was that Miller's arrest was unlawful not because of a lack of

[43] *Miller v. United States*, 357 U.S. 301 (1958).

probable cause, but because of the manner of entry to achieve the arrest.

Justice Brennan writing for the court observed that the common law had historically limited the authority of law enforcement officers to break the door of a house to effect an arrest, except that authority existed allowing forcible entry to effectuate a felony arrest. What was unclear at the common law was whether a forcible entry to arrest for a felony required the existence of an arrest warrant. But in any circumstance, said the Court, the forcible entry was unlawful unless the officer first stated his authority and purpose for demanding admission, unless some exception existed under the circumstances. In the case before it, the Court found that this requirement had not been met, rendering the arrest "unlawful" and the evidence, which again was not found on the person of Miller, inadmissible. It must be noted that the Court was not purporting to discover and announce a constitutional principle; its ruling was instead premised on the law of the District of Columbia, which all parties agreed was identical to 18 U.S.C. § 3109, which concerns on its face, however, only the execution of search warrants.

A decade later the Court considered a similar question in *Sabbath v. United States.*[44] Again the case involved a drug transaction. William Jones was caught possessing cocaine by customs agents, which he said he was to transport to a person named "Johnny" in Los Angeles. The agents called a telephone number in his possession, and Jones addressed the man answering as "Johnny" and said he had "his thing" and would bring it to his apartment.

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[44] *Sabbath v. United States*, 391 U.S. 585 (1968).

Equipped with a listening device, Jones made the delivery. Before he left the apartment the agents went to the apartment door, knocked, and, receiving no response, opened the unlocked door and proceeded inside. Sabbath was arrested and the cocaine found under a couch cushion, from which Sabbath was seen withdrawing his hand as the agents entered. Though 18 U.S.C. § 3109 only concerns entries to execute search warrants, the Court again stated that entries to arrest "must be tested by criteria identical to those embodied in" the statute, so that "we must look to § 3109 as controlling." The Court rejected the argument that opening an unlocked door does not violate the statute, holding essentially that the statute prohibits "unannounced intrusions" into a dwelling for the purpose of arrest or search. The drugs found were thus suppressed, the Court this time not stating that the arrest of Sabbath was improper, but that the "agents' entry" was not "consonant with federal law."[45]

Since *Miller* and *Sabbath* the Court has clarified several matters. First, absent exigent circumstances, an arrest warrant and reason to believe the person sought is in the dwelling are necessary before a nonconsensual entry may be made into the dwelling of that individual to arrest him or her.[46] The Fourth Amendment prohibition against unreasonable seizures of the person is violated if, in other words, the manner of entry into the dwelling to achieve the arrest is improper. But the question then arose, assuming an entry to arrest without warrant and without exigent circumstances justifying its absence, what

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[45] *Sabbath*, at 588.

[46] See *Payton v. New York*, 445 U.S. 544 (1980).

are the *fruits* of this entry? This question was reached in *New York v. Harris*.[47] There the police made an improper entry because no arrest warrant existed, and defendant later confessed. Under petitioner's view of the constitution this error of the police cannot be severed or distinguished from that which followed, so that the arrest should have been viewed as invalid and the confession suppressed as the fruit of that constitutionally unreasonable arrest. This Court did not so hold.

The holding of this Court puts the lie to petitioner's view of the constitution, for this Court focused on the nature of the impropriety and whether that "primary illegality" was "exploited" so as to obtain the evidence. The seizure of the person was made on probable cause but after an entry into the premises to achieve it which the Fourth Amendment does not allow. Rather than applying petitioner's "one size fits all" view of Fourth Amendment violations, this Court found that the improper entry violated the privacy of the dwelling, causing the suppression of physical evidence discovered in the dwelling, if any, as that evidence is gained by exploitation of the primary illegality. But the seizure of the arrestee's *person* in this situation, so long as based on probable cause, is not gained by exploitation of the primary illegality of the invasion of privacy of the dwelling, so that evidence associated with defendant's person – his confession later to the police – was not the fruit of the improper entry.[48] *Miller* thus spoke overbroadly in referring to the probable-cause based arrest after an improper entry as illegal, as the seizure of the

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[47] *New York v. Harris*, 495 U.S. 14 (1990).

[48] *Harris*, at 20.

person is proper and only the entry improper. The *manner* of effectuating the seizure of the person violated the Fourth Amendment, but because the violation that occurred was disconnected from the evidence discovered, suppression was inappropriate.

(2) *Wilson v. Arkansas*: Announcement, Causation, and Use of the Exclusionary Rule as a Scalpel

In *Wilson v. Arkansas* this Court found that "[t]he common-law knock-and-announce principle was woven quickly into the fabric of early American law," concluding that "[g]iven the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment."[49] But because not properly before it, this Court did not reach the causation issue now raised. In avoidance of the lack of a causal connection between the police error with regard to the manner of entry and the discovery of evidence described in the valid warrant, the heart of petitioner's claim – indeed, absolutely essential to it – is the assertion that if a search is unconstitutional in *any* particular it is unconstitutional in *every* particular; in other words, that it is impossible to differentiate the component parts of a search. In petitioner's view, then, a

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[49] *Wilson*, at 934.

completely unauthorized invasion of privacy of the dwelling, justified neither by warrant nor any exception to the warrant requirement, is no different in kind from an invasion of privacy justified by a valid judicial warrant, where the police search within the dwelling in appropriate places for the items sought but use arguably unnecessary force in making their entry. But as *New York v. Harris, supra*, reveals, this view is without foundation. The police in *Harris* were found to have acted unreasonably in achieving their seizure of the defendant, not because probable cause for his arrest was lacking, but because in executing their seizure they invaded his dwelling without an arrest warrant.[50] This Court readily distinguished between the improper entry, and the interests protected by that invasion, and the seizure of the person of the arrestee on probable cause, holding defendant's confession admissible because it related to the seizure of the person not the invasion of the dwelling (even though one could argue that in a "but for" sense the confession would not have been obtained, this Court's holding once again demonstrating that but-for causation is a necessary but not sufficient requirement for application of the exclusionary rule).

Harris scarcely stands alone in this regard. In the execution of a valid search warrant the searching officers may in the intensity of their search exceed the scope justified by the items for which they are searching and search in places where the items particularized in the

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[50] *Payton* does not require a search warrant for the defendant's dwelling to effectuate the arrest, but an arrest warrant; the case is thus a seizure-of-the-person case, not a "search" case, and the holding of the Court is that the manner of executing the seizure is unreasonable if there is not both an arrest warrant and reason to believe the defendant is in the dwelling.

warrant could not be found. If they do, they have executed the warrant in an unreasonable manner. What result, then, if the items described in the warrant are found during the search of appropriate scope, and either nothing is found in the portion of the search that is excessive, or contraband or other items indicating criminality are found in that portion of the search? If petitioner's "unitary theory" of warrant execution is correct, the overbroad search renders the entire search an unreasonable search, and so those items found that were named in the warrant and found appropriately must be suppressed because of the error of the police in searching places not authorized. But that is not the law – in fact, the law is quite clearly to the contrary. In this situation if contraband or evidence is found during the search exceeding the scope of the warrant, then those items are suppressed; if nothing is found during that portion of the search, then there is nothing *to* suppress; but in neither circumstance is that found during the search of proper scope subject to exclusion.[61] The same

[61] This is plainly the rule for "ordinary" cases of this type. See *United States v. Medlin*, 842 F.2d 1194, 1199 (CA 10, 1988), recognizing an exception to this principle; "[w]hen law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant." But even this exception to the general rule that exclusion is inappropriate is not universally followed. See *Klingenstein v. State*, 624 A.2d 532, 537 (Md., 1993) ("Although courts in other jurisdictions have discussed the exception, our attention has been called to only two cases in which the flagrant disregard concept has been applied to suppress all of the fruits of a search, both those constitutionally seized as well as those beyond the scope of the warrant. *United States v. Medlin*. . . . We are not persuaded to overlay the exclusionary rule of the Fourth Amendment with the 'flagrant disregard' concept. The Supreme Court has not seen fit to do so and neither do we"). And see *United States v. Le*, 173 F.3d 1258, 1269 (CA 10, 1999), recognizing

(Continued on following page)

result obtains if the warrant itself is overbroad in its description of items to be seized. It is well-established that those items seized which were described with sufficient particularity will be admitted, a doctrine impossible under petitioner's theory of the Fourth Amendment.[52]

Similarly, officers effectuating an arrest, either under warrant or without warrant, but in either case with probable cause, might err in their use of force in achieving that arrest. The seizure of the person of the arrestee is justified by the Fourth Amendment in this circumstance, but the force used is unreasonable. The manner of achieving the seizure, while subject to censure and quite possibly damages, does not result in the suppression of evidence found incident the seizure of the arrestee's person, such as by way of search incident arrest, as the discovery of that evidence is causally disconnected from the error of the police.[53] Also, this Court has held that execution of a search warrant is constitutionally unreasonable if the police allow third persons unnecessary to the execution of the warrant into the premises,[54] but no exclusionary sanction is applied to evidence recovered by the police

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that the rule even in the Tenth Circuit is that ordinarily "a search is not invalidated merely because some things are seized that are not stated in the warrant," the *Medlin* rule being applied in "very rare cases. . . ."

[52] See, e.g., *United States v. Reed*, 726 F.2d 339, 342 (CA 7, 1984); *United States v. Sears*, 411 F.3d 1124 (CA 9, 2005).

[53] See, e.g., *State v. Sundberg*, 611 P.2d 44, 50-52 (Alaska, 1980); *Winfrey v. State*, 78 P.3d 725, 729 (Alaska App., 2003); *State v. Spotted Horse*, 462 N.W.2d 463, 470 (S.D., 1990).

[54] *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

during the search because of this error.[55] The *entire* search is not rendered improper by this error on the part of the police, and the matter is left to damage suits. So also here.

Petitioner, as well as several of the cases and a few commentators, relies heavily on a straw-man inevitable discovery theory, positing it as the basis of the Respondent's position, and then attacking it. But as Justice Thomas recognized in *Wilson*, the argument that exclusion does not apply here is not one of either inevitable discovery or independent source, except by analogy. The actual argument of Respondent is that "any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation."[56] And it is to defeating the causation argument that petitioner's "unitary theory" is essential, but unavailing.

Petitioner's mocking description of Respondent's claim as a "if we hadn't done it wrong, we would have done it right"[57] theory of inevitable discovery not only misdescribes Respondent's argument, but is mistaken on its own terms. Ordinarily, a showing that "if we hadn't done it wrong, we would have done it right" *is* sufficient under the inevitable discovery doctrine. If, for example, the police arrest an individual in an automobile, and, thinking they have probable cause to search, search the vehicle beyond those areas justified by search incident arrest principles and discover evidence or contraband, that evidence will

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[55] *United States v. Hendrixson*, 234 F.3d 494, 497 (CA 11, 2000); *State v. Nelson*, 691 N.W.2d 218, 229 (N.D., 2005); *Artis v. United States*, 802 A.2d 959, 968 (D.C., 2002).

[56] *Wilson v. Arkansas*, at 937.

[57] Petitioner's Brief at 18, quoting 6 LaFave, *Search and Seizure: A treatise on the Fourth Amendment* (4th Ed.), § 11.4(a), at 272-274.

not be suppressed if probable cause is found lacking if it can be shown that under standard police policy the automobile would have been impounded and an inventory search would have occurred that would have revealed the evidence or contraband in any event.[58] The inevitable-discovery doctrine in fact *does* posit the rule that if it can be shown hypothetically by a preponderance of evidence that evidence discovered when the police "did it wrong" *would* inevitably have been discovered by the police doing it "right" in the ordinary course of events, then the evidence will not be suppressed. What the inevitable-discovery rule does *not* posit is that evidence is not subject to exclusion if it can be shown that though the police "did it wrong" they "*could* have done it right." And it is *this* straw-man inevitable-discovery "principle" to which petitioner actually objects as overbroad. Surely, if the police break into a house without a warrant or the existence of any warrant exception and search and find evidence or contraband, exclusion cannot be avoided on the ground that probable cause existed so that the police "could" have obtained a warrant and accomplished the search correctly. But *Nix v. Williams* itself demonstrates that evidence is admissible when it "would" inevitably have been discovered properly though it was actually discovered through police error. On his own terms, then, petitioner is incorrect, as are the cases rejecting the

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[58] See, e.g., *United States v. Mendez*, 315 F.3d 132 (CA 2, 2002); *United States v. Blaze*, 143 F.3d 585 (CA 10, 1998); *Camacho v. State*, 75 P.3d 370, 376 (Nev., 2003); *Ettipio v. State* 794 S.W.2d 871, 873 (Tex. App., 1990).

principle followed by Michigan and the Seventh Circuit.[59] But petitioner's terms are not the correct ones; the matter is not one of inevitable discovery, but causation.

Analogous to the causation issue involved here is *Segura v. United States*.[60] The defendant was arrested on probable cause in the lobby of his apartment building and taken to his apartment unit by the police. When his codefendant opened the door the police entered without permission, and, during a limited security check of the apartment, observed drug paraphernalia. Two agents remained in the apartment while a search warrant was obtained. The warrant was executed and three pounds of cocaine, as well as other evidence, was found. The warrant affidavit showed probable cause and was based entirely on evidence independent of the observations made during the improper entry into the apartment. In other words, had that entry *never occurred* the warrant would still have been issued and the search would have taken place, as the warrant affidavit did not rely in any way on the observations in the apartment. This Court held that the properly executed search under a warrant which was not gained through information obtained in the unlawful entry was an independent source for the discovery of the evidence found in the apartment, so that discovery of the evidence was causally disconnected from the error of the police.

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[59] See, e.g., *Ramirez v. United States*, 91 F.3d 1297 (CA 9, 1996), rev'd *United States v. Ramirez*, 523 U.S. 65 (1998); *State v. Martinez*, 579 N.W.2d 144 (Minn. App., 1998); and cases cited by the Petitioner.

[60] *Segura v. United States*, 468 U.S. 796 (1984).

To much the same effect is *Murray v. United States*.[61] There federal agents, believing that narcotics were being stored in a warehouse, made an illegal entry into the warehouse and discovered wrapped bales which they suspected contained marijuana. The premises were kept under surveillance while a warrant was obtained based upon probable cause wholly independent of the improper entry into the warehouse. The warrant was executed and the bales seized. This Court found the case governed by *Segura* and the purposes of the exclusionary rule. The defendant attempted to limit the independent source doctrine by arguing that it applies only to evidence which had not been discovered at all during an improper search, but as to that which had been discovered, suppression was required even if the evidence was later discovered validly through a wholly independent method. The Court found the defendant's description of the independent source doctrine inconsistent with prior cases and unsound as a matter of policy. Prior cases, including *Segura*, had applied the independent source doctrine to all evidence discovered pursuant to an independent source, whether previously also discovered improperly or not. Indeed, Justice Holmes had applied the doctrine to an untainted search which acquired evidence "*identical to the evidence unlawfully acquired*."[62] The basis of the independent source doctrine, much like that of the inevitable discovery doctrine, is that "[t]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the

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[61] *Murray v. United States*, 487 U.S. 533 (1988).

[62] See *Silverthorne Lumber v. United States*, 251 U.S. 385 (1920) (emphasis supplied).

police *in the same*, not a *worse*, position than they would have been in if no police error or misconduct had occurred."[63] It is in this sense, then, that the exclusionary rule is not applied to put the police in a worse position than they would have been if no error occurred – where it can be demonstrated that the evidence, as a hypothetical matter, would inevitably have been discovered in the ordinary course of events without the police error, not that it "*could*" have been discovered if the police had thought to go at the matter a different way, without any showing that this course would have been followed in any event if the erroneous conduct had not occurred. And the argument here is even stronger, for the evidence is not come at by police error, and also then obtained independently of that

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[63] See, to the same effect, *United States v. Markling*, 7 F.3d 1309 (CA 7, 1993) ("The exclusionary rule is a sanction, and sanctions are supposed to be proportioned to the wrong-doing that they punish . . . (the interests of society and the accused) are properly balanced by putting the police in the same, not a worse position than they would have been if no police error misconduct had occurred"); *United States v. Fialk*, 5 F.3d 250 (CA 7, 1993) ("applying the exclusionary rule here 'would put the police in a worse position than they would have been absent any error or violation'. . . . This is not the purpose of the exclusionary rule. . . ."); *United States v. Gravens*, 129 F.3d 974 (CA 7, 1997). And see also *United States v. Pulliam*, supra, at p. 791, rejecting a claim that the court was applying a "perverted" form of inevitable discovery in finding the discovery of a gun in a car not causally linked to defendant's detention: "If this case involved any 'exception' to the exclusionary rule at all, it would be the 'independent source' exception, since the gun was actually found in a search of the car. . . . We do not, however, have to apply either "exception" in this case because the indispensable causal connection between his detention and discovery of the gun has not been met. The requisite but-for causation is missing not only because the gun was found as a result of the search, but because his [defendant's] detention simply did not contribute or lead to the gun's discovery."

discovery; rather, the police error here is causally disconnected from the discovery of the evidence in the first instance.

D. Causation is a Necessary Predicate for Exclusion

Neither the Michigan Supreme Court nor the Seventh Circuit approach the question here by way of petitioner's straw-man inevitable discovery route. Though the Michigan Supreme Court in *Stevens* used the term "inevitable discovery" and also referred to the discovery of the evidence as "independent" of the violation by the police, it is plain that the basis for the court's decision was the causal disconnect between the violation by the police and the discovery of the evidence. So also the Seventh Circuit, Judge Posner remarking in the *Jones* case that:

> A causal link between unlawful police conduct and a seizure is *necessary but not sufficient* to justify the exclusion of reliable evidence. The inevitable discovery doctrine . . . and the independent source doctrine . . . show that violations of the fourth amendment do not automatically lead to suppression when the constitutional wrong plays a causal role in the seizure (at least, in the timing of the seizure). . . . It is hard to understand how the discovery of evidence inside a home could be anything but 'inevitable' once the police arrive with a warrant; an occupant would hardly be allowed to contend that, had the officers announced their presence and waited longer to

> enter, he would have had time to destroy the evidence. . . .[64]

If one asks the *right* question – is evidence discovered as a result of a search of proper scope and intensity pursuant to the command of a valid warrant the effect or fruit of the failure of the police either to announce or to wait long enough before entering – a negative answer follows ineluctably, *unless* a purpose of the knock and announce requirements is to allow those inside an opportunity to frustrate the warrant by hiding or destroying evidence or harming the officers who are executing it. The wrong question is whether the evidence is the effect or fruit of an "illegal entry" or an "illegal search," as both the entry and the search are legal; it is the *manner* of entry which is improper, and its fruit may be a broken door, or there may be no fruit at all.[65] Exclusion of evidence in this circumstance cannot be squared with *Wong Sun* because there is no exploitation of the primary illegality, the evidence instead being discovered by "exploitation" of the command of the search warrant, not the manner of the entry, and also cannot be squared with either inevitable discovery or independent source principles. The short answer is that but-for causation is a necessary but not sufficient requirement for application of the exclusionary rule, as these doctrines demonstrate, and it is *entirely missing here.*

Petitioner's single-minded devotion to exclusion even in the absence of a causal connection between the police

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[64] *Jones*, at 716.

[65] And in some unfortunate situations injuries may occur, and one purpose of the announcement requirement is to avoid these; Respondent is not arguing that *Wilson* was wrong, but the issue here goes to consequences in a criminal case from police error in this regard.

error and the discovery of evidence or contraband brings to mind the adage that "when all you have is a hammer, everything looks like a nail." Though this Court has never sought out "alternative sanctions" in other situations, described above by Respondent, where but-for causation is absent, Respondent would note that now, especially since *Wilson* has recognized the constitutional status of announcement principles, civil remedies exist under 42 U.S.C. § 1983 for announcement violations. Such actions *are* brought,[66] and it is quite possible that principles of

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[66] See, e.g., *Green v. Butler*, ___ F.3d ___, 2005 WL 2018888 (CA 7, 2005) (reversing a grant of summary judgment, and finding no qualified immunity for the unannounced entry); *Kornegay v. Cottingham*, 120 F.3d 392 (CA 3, 1997) (reversing grant of summary judgment in favor of officers executing the warrant); *Aponte Matos v. Toledo Davila*, 135 F.3d 182 (CA 1, 1998) (finding qualified immunity but only because the search took place prior to *Wilson*, and the officers were entitled to immunity as they thus did not violate "clearly established constitutional law" in the manner of entry prior to *Wilson*, a holding which would not obtain to entries after *Wilson*); *Johnson v. City of Aiken*, 217 F.2d 839 (CA 4, 2000) (unpublished opinion) (damages awarded but reversed because of reasonable belief of danger); *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force*, 379 F.3d 293 (CA 5, 2005) (settlement reached with DEA agent involved in the entry); *Gould v. Davis*, 165 F.3d 265 (CA 4, 1998) (defendants' motion for summary judgment on grounds of qualified immunity denied); *Ingram v. City of Columbus*, 185 F.3d 579 (CA 6, 1999) (reversal of district court's grant of summary disposition on the knock and announce claim and remanded); *Smith v. Stone*, 40 Fed. Appx. 197, 2002 WL 1478619 (CA 6, 2002) (denial of defendant's motion for summary judgment on claim of knock-and-announce violation and remand to the district court); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179 (CA 10, 2001) (defendant's motion for summary judgment denied – genuine issue of material fact existed regarding whether there was a knock and announce violation); *Turner v. Tomey*, 94 F. Supp. 2d 966 (Ind., 2000) (summary judgment to officers denied); *Early v. Bruno*, 2001 WL 775968 (ND Ill., 2001) (summary judgment granted in part denied in part regarding announcement claim); *Michalik v. Herman*, 2003 WL 2180537 (ED LA, 2003) (summary judgment for defendants in

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risk-management by governmental bodies are a greater incentive to observance of constitutional principles than exclusion of evidence. But employing the same "sanction" where the police had every right to enter and to search and seize, but entered too quickly, as when the police had no right to invade premises and seize property at all, simply makes no sense. In the latter situation privacy should not have been invaded; in the former, the announcement failure, it has been invaded by a valid judicial command. *Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does exclusion of the evidence in this situation make sense.* These violations are simply different in kind, and Respondent submits that it is myopic to treat them as though they were no different at all. Exclusion of evidence where there has been an authorized invasion of privacy and a proper discovery and seizure of evidence, then, is not, Respondent submits, an appropriate sanction for police error with regard to announcement of presence and purpose. There is no element of "causality" involved. The evidence is not the fruit of an announcement failure because the invasion of privacy involved is completely justified – and exclusion in this context makes no sense, simply thwarting the enforcement of the law, and giving unwarranted immunity to one in possession of drugs.

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announcement claim denied). And it is not surprising if frequently such actions fail, given that announcement may permissibly be foregone if the officers have a reasonable suspicion that to announce would frustrate the warrant, is a futile gesture, or is dangerous under the circumstance of the particular case. Further, in cases like the present one, where the officers simply opened the door, damages may be virtually nonexistent.

Exclusion is not designed to put the police in a worse position than if the improper conduct had not occurred, but to prevent them from being in a better position *because* of that conduct. The drugs found here were not the fruit of any announcement violation.[67] Again, if the search warrant was proper and properly executed as to scope and intensity of the search, then the only way the discovery of contraband or evidence on the premises may be viewed as "poison fruit" is to take the view that the failure to knock and announce deprived those inside the opportunity to destroy or successfully hide the evidence. One would hope that no responsible society would take such a view. This Court should repudiate such a principle.

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[67] Indeed, given that the exclusionary rule is not, as this Court has repeatedly said, constitutionally mandated, Respondent questions whether its forced application on a State that has chosen another path *in circumstances where the evidence sought to be suppressed was not discovered as a result of the error of the police* is a proper exercise of this Court's authority.

CONCLUSION

Wherefore, Respondent respectfully requests that this Court affirm the Michigan Court of Appeals.

Respectfully submitted,

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In The Supreme Court of the United States

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Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

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REPLY BRIEF

I. The Evidence Found Inside a Home Following a Knock and Announce Violation Is the Suppressible Fruit of an Illegal Entry.

Respondent's argument consists almost entirely of an effort to recast the issue in this case. Apparently realizing that the Michigan Supreme Court's *per se* rule of admitting evidence seized after knock and announce violations is inconsistent with the inevitable discovery and independent source doctrines, Respondent reframes the issue as one of causation. According to Respondent, a knock and announce violation does not *cause* the evidence found in the home to be seized; it is the warrant that authorizes the search that causes the seizure. Therefore, Respondent reasons, the evidence should not be suppressed because the violation is not the but-for cause of the seizure.

Respondent's new argument is nothing more than a name change. The argument boils down to the claim that the police presumably would have found the evidence had they knocked and announced; that is, that the evidence was derived not from the violation but from an independent source or that it would have been inevitably discovered without the violation. But as Petitioner established in his principal brief, such arguments do violence to the independent source and inevitable discovery doctrines because both doctrines depend on the existence of an independent and untainted process to recover the evidence. By contrast, Respondent's "causation" argument simply assumes away the violation.

Respondent's "but-for causation" test would apparently swallow much of the exclusionary rule. For example, if the police have probable cause for a search but elect to

enter and search a home without obtaining a warrant, Respondent never explains how it can be said that the failure to obtain the warrant *caused* the seizure of the evidence any more than the failure to knock and announce *caused* that seizure. In both cases, the evidence still would have been found had the police acted constitutionally, but Respondent never explains how one violation "causes" the evidence to be found while the other does not. While Respondent and the United States disclaim any such result, both agree that their sweeping "causation" doctrine would exempt, at the very least, all Fourth Amendment violations relating to the manner of entry or arrest from the exclusionary rule.

Neither Respondent nor its *amici* have suggested any plausible way in which the knock and announce rule can be enforced without the exclusionary sanction. Without an effective enforcement mechanism, an ancient and important privacy safeguard will be lost.

A. A Knock and Announce Violation Renders the Entry Illegal and Therefore "Causes" the Evidence Inside To Be Illegally Seized.

1. As *Miller*, *Sabbath*, and *Wilson* Confirm, a Knock and Announce Violation Renders the Entry Illegal and the Search Inside Unreasonable.

The simplest answer to Respondent's argument that a knock and announce violation does not "cause" any evidence to be illegally seized is that it is contrary to precedent. This Court has repeatedly rejected the view that a knock and announce violation is merely a minor technical error that is somehow disconnected from the police activity

that occurs inside the home immediately following the violation. Thus, the Court plainly held in both *Miller v. United States*, 357 U.S. 301, 313-314 (1958), and *Sabbath v. United States*, 391 U.S. 585, 587 (1968), that the knock and announce violations in those cases required suppression of evidence found inside.

Faced with the undeniable fact that the Court has suppressed evidence seized inside homes following knock and announce violations, Respondent and the United States strain to distinguish and discredit *Miller* and *Sabbath*. According to the United States, the evidence in *Miller* and *Sabbath* was actually suppressed not because of the knock and announce violations but because the officers did not have arrest warrants and, therefore, the arrests were illegal. Brief of United States at 22. The United States is simply mistaken. In both *Miller* and *Sabbath*, the Court unmistakably suppressed the evidence because of the knock and announce violations, not because the officers lacked warrants. *See Miller*, 357 U.S. at 313-314 ("Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed."); *Sabbath*, 391 U.S. at 586 ("We hold that the method of entry vitiated the arrest and therefore that evidence seized in the subsequent search incident thereto should not have been admitted at petitioner's trial."). Contrary to the argument of the United States, there is no indication in either *Miller* or *Sabbath* that this Court would have reached a different result if the officers had warrants.

Respondent and the United States also point out, correctly, that *Miller* and *Sabbath* were statutory decisions, but ignore the fact that this Court has repeatedly

confirmed that the federal statute at issue in those cases codified the same common law that informed the Fourth Amendment. *See United States v. Banks*, 540 U.S. 31, 42-43 (2003); *United States v. Ramirez*, 523 U.S. 65, 73 (1998).

Finally, the United States asserts that "*Miller* and *Sabbath* were rendered at a time when the Court assumed that all federal violations of the law governing search and seizure required the suppression of all evidence seized." Brief of United States at 21. Nothing could be further from the truth. Almost forty years before *Miller*, the Court held that evidence obtained through a source independent of the illegality was admissible, *see Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), and almost twenty years earlier the Court recognized that evidence attenuated from the violation was not suppressible either, *see Nardone v. United States*, 308 U.S. 338, 341 (1941). Indeed, in between the time of the decisions in *Miller* and *Sabbath*, this Court applied these doctrines in *Wong Sun v. United States*, 371 U.S. 471, 487-493 (1963), to conclude that some of the evidence obtained after an illegal entry and several illegal arrests was admissible, while other evidence was not.

It is, therefore, a distortion of history to argue that *Miller* and *Sabbath* come from an era in which this Court unthinkingly suppressed evidence upon finding a violation. It is true that this Court did not discuss at length its holding suppressing the evidence in those cases, but that is because it was obvious that a knock and announce violation rendered illegal both the entry and the subsequent police activity inside the home. Indeed, there can be no doubt about the continuing vitality of that proposition after *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995), where

the Court wrote, "we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *See also id.* at 931 ("An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.").

The point, then, is that the evidence found inside a home following a knock and announce violation is the fruit of that violation because the violation renders the police entry illegal, just as the failure of the police to obtain a search warrant renders an entry to search illegal absent an exigency. But for the illegal entry, the police would not be inside the home to find the evidence, so the evidence is the suppressible fruit of the illegality.

2. Respondent's "Causation" Argument Is Ill-Defined and Contrary to Precedent.

Respondent, apparently persuaded that the inevitable discovery doctrine cannot justify the result it desires, disclaims any reliance on that doctrine. Respondent's Brief at 27.[1] Instead, Respondent continues, the issue is one of causation.

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[1] Respondent also criticizes Petitioner for knocking down a "straw-man" inevitable discovery argument that the evidence should be admissible if the police would have found the evidence acting lawfully. Petitioner can only respond by pointing out that this "straw-man" inevitable discovery theory was precisely the one on which the Michigan Supreme Court relied. *See People v. Stevens*, 597 N.W.2d 53, 62 (Mich. 1999) (holding evidence admissible because it "would have been

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Respondent's abandonment of the inevitable discovery theory is appropriate for the reasons set forth in Petitioner's brief. The inevitable discovery doctrine, like the independent source doctrine, requires the existence of an independent source or process that resulted, or inevitably would have resulted, in the discovery of the evidence. The absence of any such independent process distinguishes this case from *Murray v. United States*, 487 U.S. 533 (1988), and *Segura v. United States*, 468 U.S. 796 (1984), in which the police initially entered illegally but then later performed searches and seizures that were, or were claimed to be, wholly independent from the initial illegal entries. The absence of an independent process also distinguishes this case from *Nix v. Williams*, 467 U.S. 431 (1984), in which search parties with no connection to the constitutional violation inevitably would have discovered the evidence.

Unlike the independent source and inevitable discovery doctrines that it now disclaims, Respondent's "causation" theory is never precisely defined, but it appears to be an inevitable discovery or independent source argument without the crucial requirement of an independent source or process. According to Respondent, the knock and announce violation should not result in suppression of the evidence found inside because "but-for causation is necessary to the sanction of suppression" and the evidence found inside a home following a knock and announce violation is actually "the fruit of [the] judicial command" to search the home. Respondent's Brief at 2, 3. In other words, it appears that Respondent's argument boils down

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inevitably discovered . . . had the police adhered to the knock-and-announce requirement").

to the claim that the same evidence would have been found by virtue of the warrant even if the police had properly knocked and announced. But this is exactly the "if we hadn't done it wrong, we would have done it right" inevitable discovery argument that Respondent purports to reject.

It is difficult, however, to be certain whether Respondent's causation theory is distinguishable from an inevitable discovery argument because Respondent never explicitly spells out its theory. Thus, Respondent fails to explain how its theory is compatible with the raft of precedent, discussed at length in Petitioner's Brief at 30-33, in which this Court suppressed evidence even while recognizing that the police could have obtained that same evidence lawfully. Respondent never explains, for example, how, under its theory, the unlawful search of the car in *Knowles v. Iowa*, 525 U.S. 113 (1998), is the but-for cause of the seizure of the evidence since the officer could have lawfully obtained the same evidence from the car by first arresting Knowles. Nor does Respondent explain how, under its theory, the agents' failure to obtain a warrant in *Katz v. United States*, 389 U.S. 347 (1967), was the but-for cause of Katz's conversation being intercepted given that the Court observed that the agents easily could have obtained a warrant to place a listening device on the phone booth.

Perhaps Respondent believes that the evidence should not have been suppressed in *Knowles*, *Katz*, and the many other cases in which this Court has suppressed evidence while noting that the same evidence could have been obtained legally. That is, perhaps Respondent believes that its test of "but-for causation" is not met in any of those

cases. If that is Respondent's position, it would work a radical restructuring of the exclusionary rule.

Respondent's failure to explain its causation theory is most stark in its treatment of home searches. Respondent agrees that evidence should be suppressed if the police search a home without a warrant, even if they have ample probable cause. But Respondent never explains how that concession is consistent with its "but-for causation" test. If the police have probable cause to obtain a search warrant but choose to act without one, Respondent does not explain how that failure to obtain a warrant is the "but-for cause" of the subsequent discovery of the evidence while the failure to knock and announce is not. In both cases, the police do not need to act unlawfully to obtain the evidence. In both cases, however, the police do act unlawfully and thereby perform an illegal entry into a home. Respondent's theory of "causation" cannot differentiate the two types of illegal entries.

While Respondent's theory of causation is not well-defined, it apparently would result in the conclusion that the *manner of entry* is, as a *per se* matter, beyond the reach of the exclusionary rule. Respondent's Brief at 33; *see also* Brief of United States at 13. That is, Respondent would divorce the entry performed under a warrant from the warrant itself. Respondent believes that the existence of a warrant makes an officer's presence inside a home lawful regardless of how the officer got inside.

This view of the significance of a warrant is wrong. A warrant is not independent of the entry it authorizes. The warrant permits an officer to make a *lawful entry* in order to perform a search inside a dwelling.